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Corporate Responsibility and the Business of Law

Halina Ward, September 2005

Foreword: framing the issues

'The great debate for lawyers in the coming century is .. whether the ascendancy of economics, competition and technology, unrestrained, will snuff out what is left of the nobility of the legal calling and the idealism of those who are attracted to its service'.
The Hon Justice Michael Kirby AC CMG, Legal Professional Ethics in Times of Change, address to the St James Ethics Centre Forum on Ethical Issues, Sydney, 23 July 1996

'Most lawyers no doubt welcome the trend [towards extension of formal legal liabilities with new forms of 'moral liability'], but it is worth asking whether the net result will be improved social and environmental performance on the part of targeted industries and companies, or whether it will be little more than a feeding frenzy for the legal profession – forcing companies back into compliance mode and minimalist solutions.'
John Elkington, Editorial, SustainAbility Radar, October/November 2004

An evolving challenge that faces lawyers is the need to more securely integrate the litigation and policy dimensions of CSR lawyering – for lawyers to merge their reactive and proactive inclinations. This may of course cause structural as well as cultural clashes within the traditional model of large law firms – as one UK-based litigator has put it to me... 'ironically it is in the lawyers' financial interests for their clients to become embroiled in costly litigation.'

Professor David Kinley, Lawyers, corporations and international human rights law, *The Company Lawyer*, Volume 25 No. 10, 2004.

Scene: Gage Whitney Pace attorneys, Midtown Manhattan

Female Lawyer: The ships will be registered in Libya and Panama, so they won't be subject to the OPA, which wouldn't allow an American company to keep a tanker like this in service very long.

Sam [also a lawyer with Gage Whitney Pace]: Actually. I have a thing. I have a thing I was going to mention, just a proposal to throw out there... Instead of buying these ships? Don't buy these ships. Buy other ships. Better ships. That's my idea.

Mr. Cameron: But Sam, we want these ships. This is as little as we've ever paid for a fleet.

Sam: Well, there's a reason why they don't cost a lot of money. They're 20-year old single hulled VLCCs that nobody wants. When they hit things, they will break. And they will hit things, because they don't have state of the art navigation systems...

Mr. Loch: Sam, I thought you told us that you covered our liability.

Sam: I did. Strictly speaking, I did. But there's a broader liability to think about. People drove past Exxon Stations after the Valdez.

Mr. Cameron: We've got PR firms for PR problems.

Sam: I think I have an obligation... Maybe they want to buy safer boats, but we never gave them the option.

Mr Gage: Are you trying to get fired?

Edited extracts from an episode of US television drama 'the West Wing', available online at <http://www.westwingdatabase.com/wwscripts/2-01.php>

About the Swedish Partnership for Global Responsibility

The Swedish Partnership for Global Responsibility was introduced by the Swedish Prime Minister together with the Ministers for Foreign Affairs, Trade, Development Cooperation, Industry and Environment on 7 March 2002 with the purpose of promoting the OECD Guidelines for Multinational Enterprises and the principles set forth in the UN's Global Compact. One important aim of the initiative is to facilitate the ambitions of Swedish companies and organizations to implement corporate social responsibility in practice in the fields of human rights, environment, core labour standards and efforts to combat corruption. The production of studies on important issues, the arrangement of seminars for the dissemination of knowledge as well as general promotion of information on existing global conventions and guidelines are important components of the initiative. This study has been commissioned by the initiative.

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The views expressed in this paper are mine and not necessarily those of the Swedish Partnership for Global Responsibility or the Swedish Ministry for Foreign Affairs. Responsibility for any errors remains my own.

Preface

This paper has been prepared with the financial support of the Swedish Ministry for Foreign Affairs as a contribution to the work of the Swedish Partnership for Global Responsibility. It is a companion to an earlier report commissioned by the Swedish Partnership for Global Responsibility – *Legal Issues in Corporate Citizenship*, which highlights the various ways in which the corporate citizenship agenda intersects with law.

This report considers the implications of the corporate social responsibility or corporate responsibility agenda not for law, but for the business of law and for commercial legal practice. Its origins lie with a criticism of *Legal Issues in Corporate Citizenship*, namely that one of the side-effects of the arguments that were set out there might be to encourage a sort of ‘legal corporatisation’ of corporate citizenship, in which corporate lawyers increasingly take control of the still-voluntary market-driven corporate citizenship agenda, thereby stifling innovation and locking business practices into narrow legal risk management.

It was not my intention to promote narrow legal risk management as the principal vehicle for securing responsible business behaviour. In fact, *Legal Issues in Corporate Citizenship* pointed to a number of challenges facing the legal profession if it were to respond appropriately to the corporate citizenship agenda. Building on that analysis, this report assesses two central questions. What kind of lawyers does the corporate social responsibility agenda need? And, secondly, how might the corporate social responsibility agenda impact the for-profit legal community? In other words, if commercial law firms are viewed as businesses, what might the implications be?

Some earlier thoughts on the implications of corporate responsibility for the legal profession can be found in my article in the University of St Thomas Law Journal issue on corporate responsibility and legal ethics (*The Interface Between Globalisation, Corporate Responsibility and the Legal Profession*¹). This report draws on those earlier ideas.

Executive Summary

This is a report about corporate responsibility and the business of law. It considers the implications of the corporate responsibility agenda for business lawyers and for the practice of business law. Its aim is to stimulate discussion in this neglected area, with a view to strengthening the contribution that business lawyers make to corporate responsibility.

Less has been written about the business of law than many other sectors. And very little has been done to address the contribution of business lawyers to the corporate responsibilities of their clients or employers. Even when analysts or campaign groups have focused on legal aspects of corporate responsibility, they have generally focused not on the legal *profession*, but rather the rules or litigation that it has generated. There has been a tendency to focus, not on the practice of business law, but on the content of laws that are relevant to corporate responsibility. That is a significant gap.

There are signs that the campaign groups who help to drive forward the corporate responsibility agenda are expanding into new focal areas – such as the international development implications of tax avoidance or foreign investment contracts – where lawyers, through their role in negotiating and drafting legal agreements – have a key role in defining the positive and negative impacts of business activities. And business lawyers whose advice is strictly speaking ‘legal’ but morally doubtful may increasingly find themselves in the corporate responsibility firing line.

The corporate responsibility agenda raises fundamental questions about the balance between lawyers’ ethical responsibilities to individual clients, and their broader responsibilities to serve the interests of justice. It invites a fresh perspective on the central questions ‘what do lawyers do and how can it be justified’?

A limited view of the business lawyer’s role would see them simply as enablers or facilitators – trained to use rules, legal argument and negotiation, to achieve their clients or employers’ commercial goals. But business lawyers may also be called upon to offer counsel as trusted advisers, deploying their analytical and commercial skills to solve problems and identify solutions to complex policy or management challenges. In-house lawyers are already deeply involved in CSR – but more may need to be done to place the legal function at the heart of strategic decision-making.

The boundaries of what lawyers can realistically do to promote corporate responsibility are determined by the culture in which they work and their ability to position themselves as more than ‘legal facilitators’; by the extent of the ‘business case’ for responsible action on the part of their employer or clients; and in the case of external legal advisors, by the extent to which they may themselves be subject to ‘drivers’ or incentives to integrate CSR-related considerations into the delivery of advice.

At its most far-reaching, corporate responsibility raises a basic challenge to the ethics of the legal profession, especially the balance between the principle of duty to the client – which is often phrased as a duty to act in the best interests of the client – and the notion that the lawyer owes a wider duty to ensure that his or her practice reflects a commitment to the proper administration of justice – including access to justice. With a rise of ‘voluntary’ corporate responsibility tools such as corporate codes of conduct or ‘soft’ law norms such as the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, the norms that business lawyers draw on in giving their advice are shifting. There is increasingly an ethical case for business lawyers to maximise their contribution to corporate social responsibility beyond the ‘business case’ for action. There has been very little reflection on the nexus between corporate responsibility and the wider public functions of the legal profession. Yet that is precisely what may now be needed.

There is potentially a significant tension between corporate social responsibility and legal management approaches. For example, lawyers who choose to act in the short-term commercial interests of their clients have the potential to impede the effectiveness of corporate responsibility tools such as the OECD Guidelines for Multinational Enterprises. Lawyers who launch into litigation without thinking through the wider implications can damage clients’ reputations, as the McLibel litigation, or South African pharmaceuticals litigation suggest. And in the US, litigation in the US against the sports goods company Nike threatened for some time to hold back progress globally in voluntary company reporting on environmental and social issues. Business lawyers were partly responsible, issuing grave warnings of the new risks for companies who chose as a matter of corporate responsibility to report to their stakeholders on their environmental and social impacts.

Notwithstanding some positive signs of alignment between CSR approaches and legal advice and risk management, the legal profession as a whole has not been quick to recognise that there are circumstances in which an understanding of CSR generates powerful calls for commercial lawyers *not* to act, or to act in *different* ways when advising businesses, or litigating on their behalf.

Legal professional associations around the world could play a significant role in building understanding on what is needed for business lawyers to maximise their contribution to corporate social responsibility. There is still some way to go. For example, the current, February 2005, edition of the Council of the Bars and Law Societies of Europe (CCBE) *Guide for European Lawyers Advising on Corporate Social Responsibility Issues* identifies a territory for lawyers, but it fails to address the need to ensure that the contribution of the profession to the progressive development of the corporate responsibility agenda is on balance a positive one.

The corporate responsibility agenda also has implications for private, commercial law firms. Commercial law firms are explicitly beginning to take up corporate responsibility in their own practices. Their initiatives build on long-standing

traditions specific to the legal profession, such as offering *pro bono* legal advice. But there is more to do. Without greater collective reflection, the legal profession may soon visibly trail other business sectors that are more ready to address some of the underlying challenges of corporate social responsibility for their overall impacts and contributions to society. A vision of corporate responsibility that is founded in *pro bono* advice, community initiatives and the development of new CSR-related practice areas will not necessarily address some of the underlying challenges.

The legal profession has a great deal to offer to the progressive development of responsible business practices. The evidence is that lawyers are already deeply embedded within the corporate responsibility agenda, just as law itself is already a significant part of corporate responsibility. But business lawyers need to become more visible in the promotion of corporate responsibility. They need to think carefully about how to integrate legal risk management with corporate responsibility approaches – particularly in those areas where there are tensions between the two. And they need to address their role with humility, so that the essential vibrancy and innovation inherent in corporate responsibility can be sustained.

Integration of corporate responsibility into legal practice will need to draw upon the best of both civil and common law traditions of legal practice. For the time being, the field is open for pioneering lawyers – wherever they are based – to show the way.

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1. Why corporate responsibility and the business of law?

This report outlines the nexus between corporate responsibility and the business of law. It outlines implications of the corporate responsibility agenda for the practice of business law of various kinds, and for business law firms. Its principal audiences are business lawyers: both those working in-house for companies that employ them, and those working as external advisers employed by commercial law firms.

The report is written from the perspective of a corporate responsibility analyst who is also a non-practising environment lawyer. As such it complements two other initiatives: guidance on corporate social responsibility and the legal profession published in February 2005 by The CCBE, the Council of the Bars and Law Societies of Europe ², and a January 2005 report from London-based City law firm CMS Cameron McKenna entitled, simply '*Corporate responsibility: the role of the legal profession*' ³(referred to later in this report as 'CMS Cameron McKenna'). Both of these of these initiatives reflect a practitioners' perspective. In contrast, this report is an outsider's perspective. It asks: from the outside looking in, what are the key issues in the relationship between corporate responsibility, the for-profit legal profession, and the practice of business law?

As in any report on 'corporate citizenship', 'corporate responsibility' (CR) or 'corporate social responsibility' (CSR), it is difficult to avoid definitional issues. The scope of the terms seems to be closely related to two main considerations. First, the extent to which importance is placed on the centrality of the 'business case' for responsible behaviour in defining the scope of CSR practices (as distinct, for example, from the 'values' or 'ethical' case for responsible behaviour), and second, the extent to which proponents see a role for government in framing the agenda.

It is probably beyond contention to suggest that CSR or CR are at heart about viewing businesses as part of society, and consequently about the obligations of business in society. But there is much less certainty about the nature and scope of these obligations, and in particular on whether the CSR agenda should be limited to consideration of *voluntary* business action above and beyond legally mandated minimum baselines. Whilst some definitions point to the significance of 'business impacts' or wider societal goals ⁴, others focus on the 'voluntary' nature of CSR as a business commitment to responsible behaviour that is not mandated by law ⁵.

The starting point for this paper is that CSR or CR are in essence about maximising the positive impacts or contributions of business activity to society, whilst minimising the negatives. In this broad sense, both agendas are sometimes understood as synonymous with the 'business and sustainable development' ⁶ agenda, which incorporates recognition of a need to balance economic, social and environmental considerations.

The legal business – the business of law – is changing rapidly: the overall number of lawyers around the world is increasing rapidly and the profession is ‘globalising’ through transnational alliances and through the adoption of transnationally resonant norms of commercial practice. A process of liberalisation of legal services is also under way, driven in part by the World Trade Organization’s General Agreement on Trade in Services (GATS). Yet less is known about the business of law than many other business sectors. Lawyer-client privilege – sometimes called legal privilege – may be partly to blame for insulating the business of law from rigorous analysis. Legal privilege is essentially the notion that information or documentation generated in the course of legal advice or litigation is to be treated as confidential and protected from disclosure in legal proceedings⁷.

It has sometimes, controversially, been suggested that economic globalisation and the pressures of competition in the legal marketplace have the potential to drive the for-profit legal community to lose sight of the justice-related public interest goals with which the profession is also closely connected. The effect of liberalisation and increased competition may increasingly be for business lawyers to view themselves simply as business people, like any others. In the words of the Hon Justice Michael Kirby, summarising AT Kronman’s *The Lost Lawyer – Failing Ideals of the Legal Profession*, ‘*The role of the lawyer in the old days involved compassion for the client’s entire predicament, tempered by detachment and also a measure of concern for the public good. The growing ascendancy of the economic view of law and a decline of its self-image as a helping profession, will continue the decline of idealism and professionalism unless this is arrested*’⁸.

This paper, then, speaks to a double gap. For not only is the literature on the business of law relatively limited, but little has been written about the wider social responsibilities of business lawyers in society, let alone the implications of corporate responsibility for their work, or the significance of those implications in an era of economic globalisation and services liberalisation. Even when analysts or campaign groups have focused on legal aspects of corporate responsibility, they have generally focused not on the legal *profession*, but rather the rules or litigation that it has generated. There has been a tendency to focus, not on the practice of law, but on its content.

There are at least six strong reasons for considering the implications of the corporate responsibility agenda for the legal profession around the world:

- The legal dimensions of corporate responsibility – including litigation with reputational impacts – already implicate the legal profession.
- The corporate responsibility agenda raises fundamental questions about the balance between lawyers’ ethical responsibilities to individual clients, and their broader responsibilities to serve the interests of justice. Corporate responsibility invites a fresh perspective on the central questions ‘what do lawyers do and how can it be justified’?
- There are indications that campaign groups who help to drive forward the corporate responsibility agenda are expanding into new focal areas – such as

the international development implications of tax avoidance or foreign investment contracts – where lawyers, through their role in negotiating and drafting legal agreements – have a key role in defining the positive and negative impacts of business activities.

- In-house business lawyers are already deeply involved in the development of corporate responsibility initiatives and management systems within their employers' businesses. And traditionally it is in-house lawyers within large businesses who lead development and supervise implementation of compliance programmes reflecting the business's core values or operating principles.
- Corporate responsibility has implications for the way in which business lawyers offer advice and meet their professional responsibilities to clients.
- Private 'for-profit' law firms are themselves businesses, and are therefore directly addressed by the corporate responsibility agenda. Many of the business models and reputational and risk management considerations that drive some business responses to the corporate responsibility agenda more widely are equally applicable to professional law firms.

Whilst lawyers have largely been overlooked in corporate responsibility, professionals from the fields of accountancy and financial services have more prominently reflected on the contribution of their professions to sustainable development. For example, in 2002 the UK's Association of Chartered Certified Accountants (ACCA), in a major report for the Johannesburg World Summit on Sustainable Development (WSSD) commented on the imperative for the accountancy profession to absorb the relevance of sustainable development⁹. The ACCA website boasts that '*ACCA has been actively involved with the unfolding debate on corporate social and environmental responsibility since 1990. We promote transparency and best practice. We aim to help businesses and organisations realise the growing importance of sustainability to them, and we have launched a number of high profile initiatives*'¹⁰.

Happily, there are now emerging signs of heightened interest in corporate responsibility within the legal profession. The legal press has run a number of articles on corporate social responsibility¹¹. A number of law firms in the rich countries of the Organisation for Economic Cooperation and Development (OECD) have begun to make statements on the availability of 'CSR advisory services' for clients, or on their own 'CSR policies', including commitments to community engagement and *pro bono* work. And several professional associations have begun to consider the implications. In both 2003 and 2004, the International Bar Association's annual conferences both included sessions on corporate social responsibility. The American Bar Association Section on International Law has organized a conference on corporate social responsibility in which speakers 'put forward their views as to how best to put a human face to a global economy'¹². And the European Bar Association, the CCBE, has produced a guide for European Lawyers advising on corporate social responsibility issues, which is now in its second edition¹³.

Readers may ask why this report focuses so much on legal practice in England and Wales and the United States. The answer is simple: it is in these countries that many of the world's largest law firms are located. And it is the commercial practices of law firms based in these countries (particularly the US) that currently have the greatest impact in shaping the overall legal climate for transnational business transactions around the world. The stamp of a big US or UK law firm on major deals may increasingly even be a required entry ticket if banks and the finance sector are to take it seriously¹⁴.

This is not to say that corporate responsibility has no implications for lawyers in other jurisdictions. Integration of corporate responsibility into legal practice will need to draw upon the best of both civil and common law traditions of legal practice. But the key to 'scaling up' the process may be to reach mainstream Anglo-American commercial legal practice.

For the time being, the field is open for pioneering lawyers – wherever they are based – to show the way. Many of the issues that are explored in this report have received little substantive research attention. This report's function is principally to highlight issues and raise questions. The practitioner's perspective will be key in bringing the issues to life and providing practical options for integrating corporate responsibility into the business of law.

2. Legal aspects of corporate responsibility already implicate business lawyers

The CSR agenda is often associated with an uncomfortably narrow definition of corporate social responsibility. In the words of the European Commission, corporate social responsibility is '*a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis*¹⁵.' This dogma, which limits the corporate social responsibility agenda to market-driven 'voluntary' action beyond minimum legal requirements, has the potential to act as a barrier to considering the role of lawyers in promoting CSR.

My earlier paper *Legal Issues in Corporate Citizenship*¹⁶ argued that it is a mistake to understand corporate citizenship, or corporate social responsibility, as inherently limited to 'voluntary' business action beyond legally binding minimum baselines. Without repeating the arguments in the earlier paper, some of the links between corporate social responsibility and law are highlighted below.

- In many parts of the world, the notion of responsible business behaviour remains inextricably linked to the challenges of ensuring that businesses meet minimum legal requirements for environmental or labour protection, fair competition or corporate governance. The 'voluntary only' definition of CSR tends to be associated with a focus on encouraging 'best practice' and

innovation among businesses. But it does little to contribute to discussion on how the worst and most exploitative forms of business behaviour could be eradicated from the global economy or, indeed, how to ensure that businesses around the world comply with existing legal requirements.

- A wide variety of laws, including for example those relating to defamation, misleading advertising, product liability, competition policy and negligence, already frame 'voluntary' CSR.
- The range of norms for business regulation with which lawyers work increasingly encompasses 'voluntary' instruments such as labelling schemes or codes of conduct. Business lawyers must increasingly factor the relevance of these 'soft law' instruments and voluntary initiatives into their advice. And these instruments may themselves be implemented in a variety of legal contexts. For example, once a voluntary corporate code of conduct is adopted in a supply chain contract, it acquires legal status as a matter of contract.
- Law and litigation are bringing new light to the CSR agenda in a variety of cases that test the boundaries of business responsibility. These cases – many transnational in scope – test the application of existing legal principles such as civil liability to some of the most difficult areas of the CSR agenda, for example investments by transnational corporations in host countries or regions, such as Myanmar, the Niger Delta or Sudan, associated with human rights abuses, violent conflict, or oppressive regimes.
- Law, and litigation, have the potential to shape businesses' reputations as responsible – or irresponsible – players, and drive improvements in business practices or in engagement with external stakeholders. The way in which litigation is managed can also have an impact on business reputations.
- The voluntary CSR agenda is itself giving rise to new laws and legislation – particularly in the corporate governance arena and in relation to company reporting on environmental and social issues¹⁷. In a recent paper, two lawyers argue that the greatest reason for lawyers to become involved in and understand the corporate social responsibility agenda is that: *'the development of CSR is moving towards an international legal framework and although most of us 'specialise' in national law, we will have [to have] an understanding of how international law functions and also how to apply legal methodology to the ongoing work of companies.'*^{18'}

Once it is accepted that law forms an important tool of CSR, it becomes clear that the legal profession too must play a part. Lawyers need to be given a significant place within CSR because their profession is at the foundations of corporate social responsibility.

Independently of these arguments, a number of overall trends in the overall corporate responsibility agenda promise to bring an increasing spotlight to the work of business lawyers. Three examples are:

- The use of litigation as a strategic tool within the corporate responsibility agenda
- Emerging interest in addressing company law through the lens of the corporate responsibility agenda

- The rise of a distinct ‘economic pillar’ in the CSR agenda, leading to a focus on areas such as tax avoidance, and the terms of foreign investment contracts between foreign investors and host country governments.

Some of the implications of the first of these three trends – the use of litigation to test the boundaries of corporate responsibility – were considered in *Legal Issues in Corporate Citizenship*. In a more recent report, the consultancy SustainAbility¹⁹ argues that there is increasing convergence between ‘legal liability’ and the ‘moral liability’ reflected in shifts in societal expectations of responsible business. They consider that those shifts might, over time, be expected to find their way into law. SustainAbility’s report points to a ‘*rapid convergence between companies’ risk management and their CSR and sustainable development programmes*’ – with strong underlying implications for processes of legal risk management.

The second trend is for company law, a basic underpinning for the creation and capture of wealth, to receive increasing attention from a corporate responsibility perspective. In England and Wales and a number of other jurisdictions, reviews of the basic framework of company law attracted increasingly well-informed contributions and analysis from non-governmental organisations (NGOs). Many NGOs have been keen to see the adoption of ‘stakeholder’ or ‘pluralist’ models of corporate governance, in which company directors are required to take account of the interests of non-shareholding stakeholders such as locally based citizens, workers, suppliers, or even the environment. And NGOs have also raised basic challenges about the treatment, as a matter of company law, of multinational corporations, calling for the recognition of the special situation of multinational corporate groups that are organised across territorial boundaries.²⁰

The third trend is to add a focus on the ‘economic’ pillar of CSR to the ‘environmental’ and ‘social’ pillars. This economic pillar is bringing increasing focus to the wider societal implications of the ways in which business deals or transactions are structured. As the consultancy SustainAbility argues, ‘*narrowly meeting legal requirements but failing to honour the spirit or intent of the law is... no longer the responsible reference for business. Society is signalling that this is morally unacceptable....*’

One example of this trend is the work of a number of NGOs on the relationship between foreign investment contracts, human rights and sustainable development²¹. Foreign investment contracts between foreign investors and host country governments define the terms on which much foreign investment in major infrastructure projects around the world takes place. A focus on the terms of these deals promises to bring a focus on new (though legally well-established) areas of commercial and drafting practice. These include the use of so-called ‘stabilisation clauses’ which can freeze the tax or environmental or labour legislation applicable to foreign investors at the date of a contract.

A second example of rising interest in the ‘economic’ pillar of CSR can be found in the signs of increasing interest in the international development implications

of tax avoidance. In February 2005, asset management firm Henderson Investors released the results of a survey of Chairs of UK FTSE350 companies to assess their responses to tax avoidance challenges. Among its key findings, the Henderson report notes that:

'With some notable exceptions, most companies do not appear to have considered systematically the relationship between their tax management and their approach to corporate responsibility'.²²

The implications of the Henderson finding for lawyers are reinforced by the 2003 declaration of the newly formed Tax Justice Network, which points directly to the role of lawyers in creating global tax avoidance structures:

'Tax avoidance now occurs on a massive global scale. Assets held offshore, beyond the reach of effective taxation, area already estimated to equal one-third of total global assets. Around half of all world trade appears to pass through tax haven jurisdictions, as corporations shift profits to where they can avoid tax. Networks of banks, lawyers and accountants create complex and secret financial structures, reducing transparency and enabling tax evasion. Claims of corporate social responsibility are undermined when low corporate tax payments are exposed. Such behaviour is economically inefficient, socially destructive, and profoundly unethical'.²³

The emergence of a distinct 'economic pillar' in the CSR agenda has significant implications for business lawyers, because they help to generate the legal obligations, the laws and the institutions that underpin trade and investment across international borders. Their negotiating skills can define the terms of foreign investment and its impacts, and the distribution of risk and rewards across international supply chains. If business lawyers are to offer the best legal advice in this new environment, they will increasingly need to factor developments in the corporate responsibility agenda into their analysis.

3. Business lawyers are deeply involved in corporate responsibility – but they could do more

What lawyers do and corporate responsibility

Getting to an understanding of the implications of corporate responsibility for business lawyers needs to start with a sense of what it is that lawyers do more generally – or what people think lawyers do. A range of perceptions²⁴ is highlighted below.

”Lawyers protect their clients’ legal interests by negotiating for them, preparing documents, providing advice, and representing them in legal proceedings. Their knowledge, training, and experience keep their clients out of legal trouble and minimize the difficulties once their clients are in legal trouble”.²⁵

”Lawyers are advocates—advocates for individuals, groups and organizations who need assistance in interpreting the law or who are in conflict with other individuals or groups. Lawyers are also interpreters of laws and regulations. They assist businesses, for example, in dealing with laws on labor relations or environmental usage. It is said that we are a nation of laws. Laws need to be understood and applied in a fair and reasonable fashion. Lawyers assist us to do so”.²⁶

”What do lawyers do? In terms of process, they negotiate, litigate, advise clients, and so forth. In terms of product, they draft contracts, write briefs, compose letters, and so on. But behind both process and product, what lawyers most fundamentally do, is think... First, the lawyer must determine what the facts are – which, in the popular mind, consists primarily of listening to witnesses or reading the relevant documents. Second, the lawyer must determine what the law is – which, in the popular mind, consists primarily of looking up the cases or statutes which deal with the subject at hand.”²⁷

”..[A] big part of what lawyers do is exploit ambiguity and vagueness in ways that further their client’s interests. This isn’t to suggest anything illegal or anything about loopholes, etc. It’s just the nature of law... Lawyers have to make the best argument they can in favor of an application of the rules that favors their client. The problem [is that] the judge cares nothing about whether a rule favors your client, the judge is interested only in who can come up with the best interpretation of the rules for this situation: i.e., an interpretation that fits with the text of the rules, and where the interpretation of applicable rules both fits with the text of the rules and where this interpretation is consistent with the applicable rules’ interactions with other rules in the huge sea of ‘non-orthogonal’ rule systems that is our nation’s body of law... .

”Half of what lawyers do is find good analogies to convince a judge ”this situation is just like X” while the other lawyer tries to convince them it’s just like Y...)²⁹

Many of these characterisations of the lawyer's role focus on what lawyers do with rules and their functions as advocates and advisors – in the interests of their clients. They underscore a view of lawyers simply as facilitators or 'enablers' – 'trained to use rules as a means to facilitate an end.'³⁰ From this limited viewpoint, lawyers do not have direct professional responsibilities for setting societal aspirations. They are back-room players.

Can business lawyers, then, really *drive* changes in the corporate practices of their clients or employers? In a major foreign investment contract negotiation, what scope does any legal adviser have to caution his or her client that their demands may force host country government counterparts to undermine many of their own public policy goals in order to secure the investment? Many external legal advisers would argue that they have little scope to shape the business strategies and policies of their clients, or to do much more than execute their stated wishes. In many cases, lawyers work simply to execute business strategies decided elsewhere, with little opportunity to influence them.

In the case of external lawyers, there are question-marks over the extent to which they might want directly to criticise bad practice on the part of their clients. As one European lawyer suggested 'the agenda for the law firm is the agenda of the client.' Or, Professor John Flood's words:

'Some of the history of the legal profession shows that around the turn of the 19/20th centuries, corporate lawyers balanced two sets of views with equanimity. On the one hand they were concerned about justice, scientific development of the law, improved access to law for socially deprived persons, etc; yet on the other they were concerned to pursue their corporate clients' interests with a vengeance, which given many of them were cartels, led to profitable results. My guess is that some of that thinking persists today. Ultimately, it will have to be client-led. I don't think lawyers will choose this route themselves. They are too risk averse, that is, they don't want to upset their clients'.³¹

But there is also a distinct breed of external lawyer whose role is to act as overall 'wise counsellor' or 'trusted adviser' independent of any immediate legal risk management issue. For example in Denmark, external lawyers customarily act as members of or trusted advisers to the boards of larger companies.³²

In sum, the boundaries of what an external business lawyer can do to promote are likely to be determined by a combination of the predisposition of their clients to seeing their external legal advisers as general trusted advisers; the extent of the 'business case' for responsible action on the part of the client; and the extent to which the external legal adviser may him or herself be subject to 'drivers' or incentives to integrate CSR-related considerations into delivery of advice.

The starting point for understanding the role of in-house lawyers is a little different. Because they are integrated within the structure of the company, in-house lawyers are perhaps more frequently likely to be called upon to advise on which courses of management action are desirable, rather than simply presenting options.

The broader perspective that their position within the company offers them may offer an advantage in terms of their ability to promote corporate responsibility. And within both the European and US legal professions there is an active debate over the pros and cons of placing in-house General Counsel at the heart of business strategy by giving them a place on the boards of companies.

The roles of in-house legal advisers are also affected by the distinct cultures of different jurisdictions. In the litigious US, the focus on potential liabilities is stronger, with an impact on the centrality of lawyers in commercial deal-making. There, 'the law department is in the driving seat', suggested one in-house lawyer with a European branch of a US multinational. And the role of the general counsel as guardian of corporate governance in the US is underscored by the new Sarbanes-Oxley Act (which is discussed further below). One Swedish in-house lawyer suggested that the in-house lawyer, based in corporate headquarters, may also be in a particularly strong position to ensure that the company's core values are integrated in foreign investment projects. He or she may be perceived by expatriate colleagues 'too tied up in the project' as a neutral adviser, but nonetheless play a role as a 'common-sense man' – one reflecting 'the company's highest ideals.'³³ The in-house lawyer may play an important role in driving up corporate standards.

Survey evidence suggests both that in-house lawyers are already deeply involved in CSR, but also that more may need to be done to place the legal function at the heart of strategic decision-making. A 2003 Legal Director/Baker and Mackenzie survey of heads of legal and general counsel at 105 multinational companies with operations in Europe³⁴ indicated that legal training accounted for 56% of the training received by in-house lawyers included in the survey, compared with 16% only for management training. In-house lawyers still saw themselves more as an objective legal adviser than as strategic business adviser. *'Asked to rate themselves on a scale of 1 (strategic business adviser) or 5 (objective legal adviser) the average rating was 3.03 – that is to say, leaning towards the objective legal adviser role.'*³⁵

The same survey³⁶ indicated that, of the companies surveyed:

- 55% have a CSR policy, and
- Of those companies with a CSR policy, more than a quarter of general counsel or heads of legal say they had a role in devising the policy, rising to 50% among those who sit on the main board of the companies. One in five (21%) said that they implemented the policy. 52% said they did not have a role to play.

In a more recent survey, published in the magazine PLC Global Counsel and based on a confidential questionnaire addressed to the general counsel of 'the world's leading 5000 multinational companies and financial institutions',³⁷ 20% of respondents indicated that the general counsel has sole or joint overall responsibility for CSR, and 83% said that the general counsel or another lawyer is involved 'to some extent.'³⁸

The survey results are startling. They strongly indicate that business lawyers have been directly responsible for shaping the approach that a significant number of multinational corporations take in their responses to the corporate responsibility agenda.

An ethical approach to corporate responsibility and business law

An alternative, if less commonly expressed approach to understanding what lawyers do is to look not to how they give advice in practice, or the commercial drivers for giving advice differently, but their wider societal roles and responsibilities as servants of justice and its administration.

Since the underlying premise of corporate responsibility is that businesses need to be understood as part of society, this approach is comfortably aligned with the corporate responsibility agenda. For example, one novice practitioner in the US writes that:

*'[W]hat we 'do' is a function of what we 'are'... It's important to keep our many hats in mind because doing so allows us to step outside of our habitual contextualization of our job as purely customer service. True, we spend the overwhelming majority of our time doing things for clients.. and clients keep the lights on, but we also owe allegiance to our courts and the public in general...'*³⁹

There has so far been very little reflection on the nexus between corporate responsibility and the wider public functions of the legal profession. Yet that is precisely what may now be needed.

At its most far-reaching, corporate responsibility raises a basic challenge to the ethics of the legal profession. The source of the challenge lies in the wider public roles and responsibilities of lawyers beyond the interests of their clients. The business lawyer's professional ethics and integrity as a professional call for him or her to advise their client to obey the law even where enforcement by public authorities is weak and there is no short-term 'business case' for doing so. A more difficult question is whether the role that lawyers play in society itself provides an ethical basis for business lawyers to advise clients to behave responsibly in all circumstances – in other words, even when what is 'responsible' is not enshrined in law, but rather in emerging societal norms or 'best practice' in the sector concerned.

In some cases, lawyers' clients or employers may not be comfortable to find their lawyers proffering advice on issues of social responsibility, seeing it as an indication that their advisers have a hidden political agenda, or that they are stepping into areas beyond their proper role as legal risk managers. But in other cases, legal advisers may be able to make a clear commercial case for responsible behaviour based on evidence of a 'business case' for CSR. And the role that lawyers – both in-house and external – play as trusted legal advisers, or on the boards of companies, may also in some circumstances enable them to go further. But these marketplace issues are distinct from the issue of whether legal professional ethics needs to do more to support CSR-maximising advice by business lawyers.

At a minimum, where business lawyers act as trusted advisers rather than simply legal technicians executing the stated wishes of their clients or employers, there

need to be both structural incentives and technical capacities to do so in ways that maximise responsible business practices. Most ambitiously, rules of professional conduct could provide a baseline that prevents lawyers knowingly from executing business plans that undermine public policy goals such as respect for human rights or poverty reduction. Corporate responsibility invites consideration of whether this notion of lawyers as guardians of public policy goals might be extended to wider spheres of business influence and impacts.

Lawyers' rules of professional conduct provide the basic benchmark for professional ethics. A 'standard conception' of legal professional ethics characterises these rules as based on two underlying principles:

1. The principle of neutrality: the lawyer may (and if no other lawyer is willing to represent a client must) represent people who wish to employ the lawyer's services regardless of the lawyer's opinion of the justice of the cause. In so doing, however, the lawyer is absolved of any moral responsibility for acts done in the name of the client, and
2. *The principle of partisanship: the lawyer is permitted and required to do everything to further the client's interests provided only that it is neither technically illegal nor a clear breach of a rule of conduct. The principle holds even when it clearly thwarts the aims of the substantive law.* ⁴⁰

Alternative conceptions of legal ethics go further, ⁴¹ encompassing concerns for access to justice, and societal aspirations for law as it relates to legal practice. With this wider starting point, management of legal professional ethics becomes a balancing act between two broad principles. The first is the principle of duty to the client – often expressed as a 'duty to act in the best interests of the client'. The second is reflected in the notion that the lawyer owes a wider duty to ensure that his or her practice reflects a commitment to the proper administration of justice – including access to justice – and to the institution of law.

Even this broader 'public interest' dimension of professional ethics is limited in scope. It does not view the lawyer's public responsibilities as directly related to the pursuit of wider goals, such as environmental protection or poverty reduction. Yet with CSR the context for the business lawyer's role as an adviser is changing rapidly, encompassing 'soft law' norms such as those found in market-based labelling or certification initiatives, or codes of corporate conduct of various kinds: these are increasingly the norms through which businesses regulate social and environmental aspects of their transactions and interactions with other businesses. And it is this expansion in the lawyer's role that provides the basis for recognition that the business lawyers' role in society goes beyond the administration of justice to upholding notions of social responsibility. There is increasingly an ethical case for business lawyers to maximize their contribution to corporate social responsibility beyond the 'business case' for action. It seems that that ethical case has not yet been made from within any legal professional association.

The potential 'corporate responsibility' role of legal ethics training in law schools and vocational training programmes might be one avenue for strengthening the

ethical dimension of corporate responsibility in the practice of business law. CMS Cameron McKenna suggest there is value in placing greater emphasis on *'the underlying principles which underpin and justify the professional rules rather than on the wording of the rules themselves...'*⁴² Academic Dan Bradlow makes a similar suggestion from a slightly different entry point, namely that: *'law schools must help students to understand their responsibility to help their clients internalise all the necessary social and environmental costs associated with their activities. This places a premium on lawyers advising their clients about the broader implications of their actions, suggesting that ethical and social responsibilities of lawyers should be organised on all courses'*.⁴³

Going further, the suggestion that there be wholesale recognition in rules of professional conduct that business lawyers have ethical responsibilities in relation to CSR may be a step too far. But conceptually it could help to tackle the sense of some lawyers that liberalisation of legal services through the World Trade Organisation, and increased competition among commercial law firms, might bring a damaging downward spiral in professional standards.

An advert by the international commercial law firm Eversheds may point to an alternative way forward. The inside front cover of the December 2002/January 2003 issue of the *European Lawyer* magazine included a full page advertisement by the firm. Headed 'Ethical lawyers for an unpredictable world,' the text ran:

'The relationship you have with your lawyers is based on trust. But could you trust lawyers who are willing to offer advice that's based on what you want to hear rather than what you should be hearing. We think the answer is no. That's why Eversheds is guided by strict ethical guidelines. We won't work for inappropriate clients. We have the ability to say 'no' when necessary. And we provide objectivity in all the advice we give. You can trust Eversheds'.⁴⁴

Eversheds' advert points the way to a solution in which a community of like-minded practitioners to begin to map out a voluntary code of ethics that makes a clear statement that *'these are the kinds of lawyers that we are; here is how we view our role in relation to the CSR agenda; here is how we will strive to fulfil it in the context of the advice that we offer'*.

4. Legal risk management can conflict with corporate responsibility

"Most lawyers are risk identifiers, not risk takers. Our training in stare decisis (precedent) makes many believe that you can only find the future by studying the past. We walk through life backwards. Identifying risk may not be a high value need now or in the future".

http://www.charlierobinsonfuturist.com/article_stampede.htm

"Today, lawyers are perceived as a barrier to corporate social responsibility (CSR) – should we be perceived as the promoters or even as the enablers? Some of us would like to think so."

Sune Skadegaard Thorsen and James Oury, October 2004

IBA Section on Legal Practice, Human Rights Law Committee Newsletter, October 2004 ⁴⁵

Tensions between corporate responsibility and legal risk management approaches

Lawyers are beginning to talk up the relevance of their core competences to corporate responsibility. London City law firm CMS Cameron McKenna suggest that: *'..the significant present involvement of lawyers in corporate responsibility is no accident but directly referable on the one hand to the relevance to CR of legal skills and technical expertise and on the other hand to the fact that the ability to make independent and objective judgements is a core professional attribute of lawyers* ⁴⁶.' A lawyer quoted in the PLC Global Counsel survey mentioned earlier argues: *'It is natural for the lawyers to be involved. CSR is partly about compliance with the law and regulations so it falls naturally within a lawyer's scope. Many lawyers also have a secondary role, that of conscience of their company.'* And Australian law firm Partner Michael McGarvie argues that using a law firm to develop a CSR strategy makes sense because *'there are few people whose job it is to see the consequences and the whole picture for the organization that either fails to comply with the law or that complies partly or provides an inadequate response* ⁴⁷

Lawyers clearly possess skills and competencies that are useful to corporate responsibility. But it is equally important to ask whether lawyers might need to make changes to their ways of working if their positive contribution to the agenda is to be maximized.

It is becoming commonplace to hear corporate social responsibility professionals within multinational corporations commenting on how their in-house – or external – legal advisers – throw up obstacles to implementation of CSR policies. Cultural

differences between the worlds of the legal professional and the CSR professional may be responsible. In a 2001 presentation,⁴⁸ the late David Husselbee, who at the time was Global Director of Social and Environmental Affairs with adidas-Salomon AG, pointed to some of the tensions between CSR, as distinct from legal, management approaches.

CSR	Legal
Responsibility	Liability
Transparency	Confidentiality
Building Bridges	Cautious defensiveness

The underlying challenge is not dissimilar to that which faced the Anglo-American branches of the legal profession during the 1980s as they reflected on their role in the rapidly developing 'alternative dispute resolution' (ADR) movement. In essence, many ADR processes such as mediation and facilitation focus not on legally defined rights, but on identification of areas of common interest among the parties.

Lawyers moved quickly to claim a stake as mediators and facilitators, arguing that their problem-solving skills and independence made them well suited to the task.⁴⁹ Even so, some commentators questioned whether legal skills and the lawyer's mindset were in reality sufficiently well-tuned to the consensus-building process of mediation:

The mediation process can be preserved, while still admitting lawyers into mediation, if there are changes. The legal attitude, curriculum and environment must be broadened. Lawyers must learn how to generate creative options. They must understand collaboration. And they must learn how to facilitate, not just evaluate'.⁵⁰

A similar shift may now be required of the legal profession as it seeks to define its space in the corporate responsibility agenda.

A number of examples illustrate the potential tension between CSR and legal risk management approaches. As the examples that follow suggest:

- When narrow legal risk management not broader reputational considerations dominate, business-initiated litigation can backfire.
- A narrow approaches to identification of legal risks can on occasion threaten progress in the CSR agenda as a whole
- An adversarial or legalistic approach to interpretation of non legally-binding initiatives for promotion of responsible business practices can undermine the effectiveness of their potential contributions to corporate responsibility.

Value-destroying litigation

The stories of three legal actions – the so-called 'McLibel' action; South African pharmaceuticals litigation; and litigation by Nestlé's against the government of

Ethiopia (each of which was highlighted in *Legal Issues in Corporate Citizenship*— and in the Box below) clearly illustrate the potential reputational drawbacks of litigation that is judged, in the public sphere, with reference to corporate responsibility considerations.

McLibel

The so-called ‘McLibel trial’ was an epic courtroom battle between food company McDonald’s and two environmental activists, Helen Steel and David Morris. Steel and Morris defended themselves against McDonald’s in a libel trial that became the longest ever trial in English legal history when it lasted for a total of 314 days. The legal action focused on allegations made in a six-page leaflet, ‘What’s wrong with McDonald’s’ which dates from 1986 and which the company claimed Steel and Morris had distributed. The judge’s ruling was handed down in an 800-page judgment on 19th June 1997.

The judge awarded total damages of £60,000, reduced in 1999 to £40,000 on appeal. But McDonalds’ victory was ultimately partial at best. ‘Not since Pyrrhus has a victor emerged so bedraggled’, said one newspaper.⁵¹ McDonald’s was reported to have spent a total of £10million on the action.⁵² Though a number of the statements included in the leaflet were held libellous, others were upheld.

In February 2005, the European Court of Human Rights declared that the trial was in breach of European Convention on Human Rights provisions on the rights to a fair trial and freedom of expression, principally because of the lack of availability of public legal assistance in defamation cases.⁵³

The ‘McLibel’ leaflets continue to be distributed to this day by activists and via the internet.

Access to medicines

In 1998, the Pharmaceutical Manufacturers’ Association of South Africa, together with forty pharmaceutical companies, initiated a legal action against the South African government, along with Nelson Mandela, then President of the Republic of South Africa and a number of other senior political figures and state officials. The companies sought to challenge the constitutionality of provisions in the 1997 Medicines and Related Substance Control Amendment Act on the grounds that they were in breach of South Africa’s international obligations on protection of intellectual property and its own Patents Act. The Amendment Act set out a range of measures to secure access to affordable medicines, including provisions on compulsory licensing of patented drugs, requirements for pharmacists to dispense generic drugs in place of brand-name drugs, the introduction of a pricing committee, and provisions on so-called ‘parallel imports’ of patented, brand-name drugs from countries where they are available at lower cost. The legislation formed a key part

of South Africa's response to the AIDs pandemic, though its coverage was not limited to HIV/AIDs treatment drugs.

A powerful international NGO campaign against the companies rapidly gathered momentum, spearheaded by the South Africa-based Treatment Action Campaign. The campaign drew attention to the contrasts between the companies' action to uphold their patent rights, and the human rights of the people living with HIV/AIDs in South Africa whose health the South African legislation was designed to protect. Shortly after an adjournment in the case, a number of the companies announced significant reductions in the prices of drugs used to combat HIV and AIDs, and in April 2001 the action was unconditionally withdrawn.⁵⁴

Litigation in the face of famine

As press coverage of famine in Southern Africa increased in 2002, Nestlé's long-standing US\$6million claim against the government of Ethiopia took on a new significance. At face value, the claim was a straight commercial one – compensation for the 1975 nationalisation of a business owned by a German company that had since become part of Nestlé. But the imagery was stark: a huge multinational corporation suing a cash-strapped government in one of the world's poorest countries at a time of desperate human need. As pressure mounted, the company accepted an initial compensation payment of US\$1.6million, and announced that it would be making the money available immediately for famine relief in Ethiopia.

A company spokesman argued that the settlement was in the Ethiopian government's own interest: *"It is in the Ethiopian government's interest to reach a deal as a way to ensure continued flows of foreign direct investment in the country"*⁵⁵ but announced that the company was initiating inquiries with representatives of the Red Cross and Red Crescent over how best to direct the money. Finally, on 24th January 2003, Nestlé announced that it had signed a settlement agreement for a total of some US\$1.5million, bringing an end to the litigation.

Source: Halina Ward, *Legal Issues in Corporate Citizenship*, 2003

Litigation that holds back progress in the company reporting agenda

Publicity surrounding a legal action in the US – *Kasky v Nike* –⁵⁶ illustrates the potential for conservative approaches to assessment of legal risks to undermine progress in the CSR agenda as a whole. The *Kasky* case focused on statements which Nike had made in its defence when under attack over labour practices in its supply chain. Californian resident and environmental activist Marc Kasky challenged the statements under Californian consumer protection legislation as false or deceptive. Nike in response argued that its statements benefited from protection under the US Constitution's First Amendment on freedom of speech. California's Supreme Court disagreed and the case was eventually settled out of court. The basic facts are set out in the box below.

The Californian Supreme Court's judgment gave rise to a suggestion that if corporate responsibility-related statements that could be read by people in California were not protected by the First Amendment from challenges of the sort mounted by Marc Kasky, the consequence could be a major 'chilling effect' on the development of that part of the CSR agenda that focuses on the environmental and social reporting practices of businesses.

Business lawyers were quick to point to the risks that the litigation posed for the future of company reporting on environmental and social issues. Before the case settled, two analysts with DLA Upstream were arguing that '*If Nike loses [in the Kasky v Nike case] it could mean the end of voluntary CSR reports as they currently exist as they could prove too great a potential liability.*'⁵⁷ Yet this interpretation was not the only one possible – there were also strong arguments that *Kasky v Nike* carried few negative implications for voluntary company reporting. Very little press coverage of the *Kasky* case placed the litigation within the broader context of the corporate responsibility agenda and the public interest in clear and truthful corporate communications.⁵⁸ For some time, there were fears that the case could hold back progress in the corporate responsibility agenda by exerting a chilling effect on company reporting and transparency on CSR-related issues.

In *Kasky v Nike*, Californian resident and environmental activist Marc Kasky challenged a variety of statements made by Nike over a period beginning in 1996, a time when the company was under sustained attack from a variety of individuals and NGOs over labour practices in its supply chain. Nike responded to these attacks through a variety of communications ranging from press releases through to letters addressed to university presidents. In essence, these communications said that Nike products were manufactured throughout the world in accordance with a strict code of conduct, and that they were free from sweated labour.

Californian consumer protection legislation, recognising the limited resources available to public attorneys-general, enabled any Californian resident, whether she or he has suffered damage or not, to bring an action as a 'private attorney-general'. This legislation was effectively repealed in November 2004, following citizen approval for a referendum that required persons bringing a lawsuit in California to actually sustain injury of the sort complained of. And, since then, only the state's attorney-general may file lawsuits on behalf of the citizens of California.⁵⁹

In his suit, however, Mr Kasky claimed, in his capacity as a private attorney general, that a number of Nike's statements were false or deceptive and that, consequently, they were not covered by the US Constitution's first amendment enshrining freedom of speech. Nike cited the US Constitution's First Amendment protection. Initially, the San Francisco Superior Court and the California Court of Appeal dismissed the action, agreeing with Nike that the company's statements were indeed protected by the First Amendment. But in May 2002, the California Supreme Court ruled by a majority of 4:3 against dismissing the action on First

Amendment grounds.⁶⁰ Key to the Court's ruling was its determination that Nike's statements amounted to 'commercial speech', because they were directed by a commercial speaker to a commercial audience (consumers of Nike products), making representations of fact about Nike's business operations 'for the purpose of promoting sales of its products'.

Commercial speech is not subject to the same level of protection as 'political speech' under the First Amendment, and US legislatures are free to prohibit commercial speech that is false or misleading. The consequence is that Nike's statements made in efforts to defend their Asian business practices – in the specific contexts in which they were made – were subject to California's laws on unfair competition and false advertising in the usual way. That in turn means that Nike will have breached unfair competition law if members of the public are likely to have been deceived by its statements. Nike appealed and in January 2003 the US Supreme Court announced that it would review the Californian Supreme Court's judgment. In an opinion issued in June 2003, the Court dismissed the request for review on the basis that it lacked jurisdiction, in part because no final judgment had yet been issued by a Californian Court.⁶¹

Nike initially indicated that as a result of the Californian Supreme Court judgment it had decided '*to restrict severely all of its communications on social issues that could reach Californian consumers, including speech in national and international media.*' It cancelled release of its annual corporate responsibility report, decided not to pursue a listing in the Dow Jones Sustainability Index, and refused 'dozens of invitations ... to speak on corporate responsibility issues.'⁶² Yet it is far from clear that the tests applied by the Californian Supreme Court would necessarily apply to voluntary company reports or speeches in the same way as Nike's factual statements. The long-term reputational benefits that are among the principal drivers of voluntary company reporting may not be held to have the same nexus with 'promoting sales' as the kinds of defensive factual statements that were at stake in the Kasky case.

In September 2003, the parties announced that they had reached agreement on an out of court settlement.⁶³ In a joint announcement, the two sides declared that they had '*mutually agreed that investments designed to strengthen workplace monitoring and factory worker programs are more desirable than prolonged litigation.*⁶⁴' As part of the settlement, Nike agreed to make additional workplace-related programme investments totalling US\$1.5million. The funds were slated for the Washington DC-based Fair Labor Association (FLA) for work in three defined areas.

After a period of uncertainty over the long-term impacts of the *Nike* litigation, it now seems clear that initial fears that it could mark the end of voluntary CSR reporting were exaggerated. A more sophisticated appraisal of the risks is now emerging. In the words of US CSR lawyer Phil Rudolph, for the future, sensitive legal advice on issues associated with public reporting will need to '*balance the risks of disclosure against the corresponding rewards – in other words to do what business leaders do.*'⁶⁵

Legalisation of voluntary tools of corporate responsibility

Some of the new range of 'voluntary' tools of the corporate responsibility agenda also have implications for the way in which lawyers deliver their advice. A rigid insistence on adversarial negotiation and narrow legal risk management, without regard to the contemporary corporate responsibility context can on occasion threaten to undermine the distinct policy space occupied by some of these initiatives. The interaction of lawyers with two initiatives: the UN Global Compact, and the OECD Guidelines for Multinational Enterprises illustrate the point.

The UN Global Compact⁶⁶ was launched at the personal initiative of UN Secretary General Kofi Annan in 1999. The Compact is a partnership and learning initiative based on ten core principles – three environmental, three in the field of labour rights, three in human rights, and one on corruption⁶⁷. Critics have focused on its voluntary, non-binding, nature – arguing that it does little to prevent 'bluewash'⁶⁸ and that company support for the ten principles should at a minimum be linked to third party processes to monitor compliance. By way of contrast, there have also been anecdotal suggestions that levels of participation by US-based companies in the UN Global Compact may have been held back as a result of advice from US lawyers worried that claims of adherence to the Compact's principles could generate risks of litigation.⁶⁹ Indeed, there appears to be concern within the UN to educate business lawyers to ensure that they are supportive of the efforts reflected in the UN Global Compact.

In January 2004, the UN's legal counsel and Under-Secretary-General for Legal Affairs, Mr Hans Corell, appealed thus to business lawyers at the 2004 Midwinter Council Meeting of the American Bar Association's Section of Business Law:

'You may ask: what is the role of corporate counsel in relation to the Compact? Let me take human rights as a point of departure even if the argument could be made equally for labour and the environment. Lawyers have a special responsibility in society. It is of particular importance that they are familiar with the international obligations that their country has undertaken at the international level, i.e. vis-à-vis other states, and contribute to the fulfilment of such obligations. You will of course counter and maintain that your main responsibility is to your client. This is correct, but the two responsibilities may not necessarily be in conflict with each other. On the contrary! The matters that the Compact focuses on are often given prominent attention in the media and public discussion. Ultimately companies will be assessed by public opinion, and as we know the agenda for the debate is here often set by non-governmental organizations. It is therefore important that companies that are proactive in this field also in their own interest'.⁷⁰

Mr Corell stressed the voluntary nature of the Compact and his belief that companies would not be held accountable if they failed to meet the standards of the Compact.

Even the Global Compact Secretariat itself stresses that participation in the Compact does not bring legal consequences. A 'common questions' document prepared by the Secretariat⁷¹ explains that:

'As the initial step for participation by a company in the Global Compact initiative, a company has to send a letter to the UN Secretary-General, signed by the Chief Executive Officer and possibly endorsed by the board, expressing support for the principles of the Global Compact. The statement is an aspirational commitment rather than a commitment "to comply with the principles" or to "meet the objectives"...

While participating companies are expected to publicly advocate the Global Compact and its principles in company press releases or speeches, they are not required to comment on their specific actions with regard to the Global Compact principles in these public communications. Thus, such statements do not raise issues of legal liability regarding the company's compliance with the principles it has publicly endorsed...

Companies are only expected to describe the ways in which they are supporting the Global Compact and its nine [now ten] principles in their annual reports or similar corporate reports; i.e. documents whose accuracy is mandated by law. Thus, a company will not be subject to a greater risk of liability by including a description of the corporate practices related to the Global Compact principles.

During three years of operation of the Global Compact, there has not been any indication that participating companies have been exposed to a greater risk of liability'.

More recently, the Global Compact Secretariat worked directly with the American Bar Association to develop a model letter that US-based companies can use to sign on to the Global Compact.⁷² The UN Global Compact Press Release announcing agreement on the letter notes that: *'the leadership of the ABA Business Law Section expressed their hope that the letter, with its emphasis on the voluntary nature of the Global Compact, will allay legal-oriented concerns to U.S. corporations joining the Global Compact'.*

Insensitive lawyering also has the potential to prevent a second major corporate responsibility instrument from realising its potential. The principal intergovernmentally agreed instrument for securing corporate accountability through a non-legally binding mechanism is the OECD Guidelines for Multinational Enterprises.⁷³ The Guidelines were initially agreed in 1976, with negotiations on the most recent revisions to the Guidelines concluded in 2000. They contain voluntary principles and standards for responsible business conduct, including human rights, labour, environment and taxation.

The OECD Guidelines do not directly bind enterprises, but their force for business lies in the political agreement of the OECD member countries, together with an additional group of eight⁷⁴ non-OECD countries that have indicated their intention to adhere to them, to establish 'National Contact Points' (NCPs). The principal

responsibilities of these NCPs are to make the Guidelines known; disseminate them; respond to enquiries about the Guidelines; and to report annually to the OECD's Investment Committee on their activities.⁷⁵

Importantly, NCPs are also charged with contributing *'to the resolution of issues that arise relating to implementation of the Guidelines in specific instances. The NCP will offer a forum for discussion and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law'*.⁷⁶

Already, there are indications that law and lawyers are contributing to delays in the resolution of issues raised with NCPs. Documenting 'specific instances', as they are known, with any degree of rigour is impossible, since the procedural guidance to NCPs that is associated with them provides expressly for 'confidentiality of proceedings.'⁷⁷ Nonetheless, it is already apparent that there are real risks that the potential positive contribution of the Guidelines to the corporate social responsibility agenda as a whole could be held back by a process of what might be termed 'creeping legalisation'.

Examples have already arisen of specific instances in which companies whose activities are the subject of complaints to the NCPs seek legal advice on the application of the Guidelines to the instant at issue, holding back speedy resolution of the substantive issues. And lawyers acting for companies whose activities or operations are the subject of a specific instance have placed a major burden of proof on complainants or on National Contact Points by putting forward large volumes of paperwork to refute claimants' assertions – in a level of detail that complainants cannot refute without a major investment of resources and, potentially, legal advice.

Any creeping legalisation of the Guidelines by businesses and their legal advisers strengthens the hand of non-governmental organisations who have rejected a 'voluntary only' CSR agenda in favour of work to strengthen legally binding corporate accountability. As the Clean Clothes Campaign argues, *'Although [the] guidelines are very weak it is hard to ignore them, because whenever there's an attempt to push for legislation that would hold companies accountable for labor conditions almost every government refers to the OECD guidelines and procedures'*.⁷⁸ The potential collective business interest in ensuring that the Guidelines are respected and effective in meeting their goals can be undermined by individual businesses who turn to lawyers and adversarial dispute resolution mechanisms when faced with a specific instance that could damage their reputations. The ways in which legal advisers view their own roles in relation to CSR, and the future pathways of collective action on CSR within the community of business lawyers as a whole, will be key to finding ways out of the current 'prisoner's dilemma'.

Integration of legal risk management and corporate social responsibility is under way

The examples given above show some of the ways in which legal risk management may conflict with CSR. But there are also signs that a necessary process of integration between legal risk management and CSR is under way.

The fact that lawyers are increasingly factoring 'soft law' norms such as the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights⁷⁹ into their advice, at the same time as assisting in their progressive development as a normative framework, is one yardstick.⁸⁰ More broadly, writing in 2001, two lawyers with Baker and Mackenzie, James Cameron and Sunwinder Mann, see 'increasing convergence in what corporate lawyers and corporate citizenship teams are advising their clients.'⁸¹ Cameron and Mann argue that:

'..the business lawyer has never advised his or her clients in a vacuum. Most, if not all, commercial clients expect their lawyers not only to advise on the legal position, but also to provide practical advice on the commercial impact of a legal course of action they may choose to pursue. The litigation lawyer may advise his client not to pursue a contractual claim despite a strong legal claim... The intellectual property lawyer may advise his multinational pharmaceutical client not to act against a third world country manufacturing cheap generic drugs in order to help fight disease even if this amounts to a violation of the client's patent rights... There is one fundamental reason why the business lawyer has already been providing practical commercial advice in addition to traditional legal advice – to guarantee the protection and integrity of the client's most valuable asset, its brand name and reputation'.⁸²

CMS Cameron McKennas make a similar point: *'..the external adviser can be expected to advise not only on the strict legal position in the matter in question but also on the extent to which enforcement of legal rights (e.g. the decision to engage in protracted and expensive litigation) may have significant disadvantages in terms of damage to the client's reputation.'*

The trend for law firms increasingly to appoint in-house counsel themselves⁸³ may also offer a potential focal point for efforts to integrate understanding of professional ethical dimensions of the corporate responsibility agenda within commercial law firms. And a fully integrated approach between legal advice and corporate social responsibility might support the emergence of new approaches in which 'out of house' lawyers work alongside other professionals advising on corporate responsibility: social auditors and certifiers, partnership brokers, non-governmental organisations, and corporate responsibility standards bodies such as Social Accountability International or the Global Reporting Initiative. An appropriate mix could be achieved through strategic alliances. But it might also be achieved through multidisciplinary partnerships.

There is a certain irony here that as the corporate responsibility agenda leads to calls for greater cross-fertilisation, its evolution in the US in the wake of the collapse of Enron Corporation has been associated with a backlash against the idea of multidisciplinary partnerships and the ‘dilution’ of professional responsibility that they are potentially associated with.⁸⁴ The result may also be a missed opportunity better to connect the legal profession with wider corporate responsibility issues.

5. The profession’s response to corporate responsibility doesn’t yet go far enough

Legal professional associations around the world could play a significant role in building understanding on what is needed for business lawyers to maximise their contribution to CSR. But examples from two such bodies, the American Bar Association, and the pan-European CCBE, suggest that there is still some way to go.

In March 2002, the American Bar Association established a Task Force on Corporate Responsibility (the ‘ABA Task Force’)⁸⁵ with a mandate to examine ‘systemic issues relating to corporate responsibility arising out of the *‘traumatic and unexpected bankruptcy of Enron and other Enron-like situations which have shaken confidence in the effectiveness of the governance and disclosure systems applicable to public companies in the United States’*. The Task Force’s report, published a year later in March 2003, sets out a concept of the corporate lawyer as a promoter of corporate compliance with law. In their words, *‘[t]he competition to acquire and keep client business, or the desire to advance within the corporate executive structure, may induce lawyers to seek to please the corporate officials with whom they deal rather than to focus on the long-term interest of their client, the corporation’*.⁸⁶

The Task Force argues that lawyers who provide legal advice to corporate clients most effectively *‘fulfill that duty of independent professional judgment by gaining a thorough understanding of the client’s objectives, so that they can most readily identify means to achieve those objectives that comply with applicable law’*.⁸⁷ But they do not go further to comment on the potential role of lawyers in promoting the highest possible standards of corporate responsibility.

Discussion on CSR and the legal profession in Europe goes just a little further. In a first, 2003, edition of its *Guide for European Lawyers Advising on Corporate Social Responsibility Issues* the CCBE’s CSR Discussion Group argues that *‘Responsibility for advising on CSR issues has not always been seen as falling to the legal profession. The CCBE believes that this should change. Law is the codification of basic human values. The goal of CSR is to implement these values in corporations, thus CSR develops and functions in a legal framework. There is no other professional who both has such ready access to EU boardrooms, and enjoys legal privilege. As a result, advising on CSR issues should become an everyday matter for corporate lawyers.’*⁸⁸

In rapidly developing and market-driven policy agendas – such as CSR – human values may evolve more quickly than law is able to catch up. Consequently, if business lawyers are to play a key role in ensuring that these emerging values are supported by the application of law, there may be an argument for them to play a much stronger role in advocating legislative change in areas where values have outpaced law. That may be a tall order. And even to the extent that law can be understood as a codification of basic human values, one might ask whether the reality of mainstream commercial legal practice equips lawyers to reflect on them in their day to day working lives.

In its second, 2005, edition of the Guide, the CSR Discussion Group's entry point has changed. Gone are the references to the relationship between law and human values. Instead, the entry point is now essentially reactive: a business-based argument that lawyers will increasingly need to be conversant with CSR if they are effectively to meet clients' needs:

'The task of advising on CSR issues has not always been seen as falling to the legal profession. This has resulted in CSR being an under-developed area for lawyers. However, as companies increase their commitment to CSR, they will start to demand from their legal advisers that they are conversant with the area and able to give advice. A company might be reluctant to take advice from the lawyer if the lawyer is not familiar with CSR policies and CSR implementation. Furthermore, companies involved in CSR impose CSR requirements on suppliers. Law firms are also considered suppliers of services and could be asked to comply with the client's code of conduct'.

As with the previous edition of the Guide, the February 2005 edition continues to argue that the reasons for lawyers to be involved in CSR include their access to boardrooms, and the unique role offered them by legal professional privilege.

As to the first of these two justifications (access to boardrooms), whether lawyers' access to board rooms overall gives rise to positive and progressive contributions to companies' overall corporate social responsibility strategies will depend critically factors including the individual lawyer's overall attitude to his or her role, the culture of the law firm (in the case of external advisers) and the extent to which company directors and business managers are comfortable with legal advisers acting in wider 'trusted adviser' roles beyond the pure legal context of legal rights and obligations and legal risk management.

The second justification that the CSR Discussion Group proposes for the involvement of lawyers in CSR (legal professional privilege) essentially amounts to a claim that the confidentiality associated with legal privilege is a distinctive selling point for the profession. Fundamentally, this runs the risk of perpetuating, rather than resolving, the tension between the corporate social responsibility agenda's emphasis on transparency and openness, and the inclination of many business lawyers to celebrate confidentiality. It has the potential to lock in narrow risk management approaches of the sort that became heavily publicised in the

wake of the Kasky v Nike case discussed above. The engagement of lawyers in the implementation of corporate social responsibility strategies potentially offers a way for businesses to keep uncomfortable facts about their performance or impacts from public view. The CCBE's views are worth quoting in full:

'A CSR policy is only credible when the company supervises and audits its implementation in its day-to-day business. So far at least in Europe no 'safe-harbour-rules' apply, i.e. there is no legal regime in place which would guarantee a company undertaking a CSR audit not to be held liable by the competent authorities or a public prosecutor on the basis of information or documentation generated in the course of such an audit. Thus a company voluntarily undertaking a CSR audit might suffer a disadvantage compared to its competitors which do not undertake such an effort. As long as no 'safe harbour' rules exist in order to encourage companies to examine honestly and carefully their operations, the attorney-client privilege, applied in accordance with the national rules and regulations, can help to encourage enterprises to undertake assessments and audits, and to generate eventually (detrimental) information. Such information may lead to (silent) remediation measures and thereby enhance CSR compliance and good corporate and social governance.'

As pressure mounts for public and verified reporting of corporate performance against stated environmental objectives, it seems unlikely that extensive reliance on attorney-client privilege in implementation of CSR will be a hallmark of leading corporate practice. The notion that an important contribution of business lawyers to implementation of CSR lies in their privileged ability to help clients to 'get away with' environmental or social transgressions is hard to square with a commitment to best practice – even when transgressions are (silently) remediated. The reliance on client-attorney privilege is a missed opportunity to define leading edge practice for business lawyers.

This is not to suggest that there is no value in private, confidential relationships between businesses and their advisers – particularly in encouraging businesses that might otherwise not take the CSR agenda seriously to do just that. What is missing in the CCBE's Guide is reflection on the balance between cutting edge 'best practice' on transparency that could generate a 'race to the top' in which businesses compete to be considered 'leaders'; and the possibility that widespread reliance on legal professional privilege could generate a 'race to the bottom' with lawyers the key intermediaries facilitating primacy of private interests over wider public concerns. The real challenge is to find a middle ground. In cases where businesses are new to the agenda, both in-house and external legal advisers could play a catalytic role in raising awareness of the issues, supporting managers as they identify viable options for integrating a commitment to CSR across their activities.

Aside from situations where clients seek advice from their lawyers in relation to actual or contemplated litigation, (which are also subject to legal privilege), legal privilege attaches more widely to 'legal advice.' For lawyers engaged in provision of CSR advisory services, a key question then is whether general advice given on matters of CSR 'best practice' or development of CSR policies is covered by legal

privilege. In England and Wales, a recent House of Lords decision indicates that when deciding whether advice is 'legal advice', courts will look to identify a 'relevant legal context', and consider the extent to which the advice involves the exercise of the lawyer's skills as a lawyer.⁸⁹ The wider business lawyers cast their net in CSR – seeking to deploy their skills to offering general advice on the values or ethical issues underpinning CSR and their relevance in particular operational contexts – the less likely it seems that that advice will be subject to legal privilege. It seems doubtful that the basic legal baseline for 'responsible' business behaviour will be sufficient to ensure that legal privilege attaches to all CSR-related advisory work carried out by lawyers. Business lawyers will need to make this clear to their clients.

The current edition of the CCBE's *Guide for European Lawyers Advising on Corporate Social Responsibility Issues* carves out a territory for lawyers, but fails to address the need to ensure that the contribution of the profession to the progressive development of the corporate responsibility agenda is on balance a positive one.

Notwithstanding some positive signs of alignment between CSR approaches and legal advice and risk management, the legal profession as a whole has not been quick to recognise that there are circumstances in which an understanding of CSR generates powerful calls for commercial lawyers *not* to act, or to act in *different ways* in some of the areas that have long been established as falling within their direct sphere of activity.

In future work, trade associations such as the CCBE and the American Bar Association could usefully seek to reflect and offer guidance on the potential implications of the corporate social responsibility agenda for legal practice in those areas where there are potentially tensions between lawyers' established ways of working and the range of management approaches that have emerged from CSR.

6. There is a business case for corporate responsibility in commercial law firms

The market-based corporate responsibility agenda is grounded in the notion that there is a 'business case' to be made for responsible business practices. In other words, that being a 'responsible' business can make commercial sense. This section outlines some of the drivers that are particularly relevant to lawyers in private practice – in other words to law firms viewed as businesses in their own right. The next section highlights some of the initiatives that law firms are already undertaking.

Reputation and branding drivers

Reputational and branding considerations are potentially a major driver of corporate responsibility initiatives within law firms. At a very basic level, a law firm's reputation has the potential to be harmed by questionable business practices on the part of its lawyers – or even, potentially, its willingness to act for unsavoury clients.

Most students and practitioners of law are familiar with the ethical dilemma 'under what circumstances would you refuse to act for someone?' The question is similar to the one posed to businesses: 'are there circumstances in which you would refuse to invest in a particular country on ethical or human rights grounds?'

Conventionally, the response of lawyers has been that 'everybody deserves the best possible legal representation to defend uphold their rights'. However, not only is the real-world fact that the quality of legal advice available to individuals or businesses may be highly dependent on the availability of financial resources to the client, but lawyers may also be constrained from refraining to act by rules of professional ethics. For example, a barrister practising as an advocate in England and Wales:

'601. ...must not withhold those services:

- (a) on the ground that the nature of the case is objectionable to him or to any section of the public;*
- (b) on the ground that the conduct opinions or beliefs of the prospective client are unacceptable to him or to any section of the public;*
- (c) on any ground relating to the source of any financial support which may properly be given to the prospective client for the proceedings in question (for example, on the ground that such support will be available as part of the Community Legal Service or Criminal Defence Service).'.⁹⁰*

A similar rule is applied to solicitor-advocates.⁹¹ Consequently, it ought to be uncomfortable for advocates generally that potentially, as CMS Cameron McKenna note:

'..the reputational risk to law firms for being seen to .. represent clients whose own business morality is open to criticism is increasing.'⁹²

It is in the corporate governance arena that lawyers have reflected most deeply on the reputational risks of 'bad legal practice'. Corporate responsibility and corporate governance have always been closely intertwined. Indeed, one of President Bush's major statements in the wake of the collapse of the Enron Corporation in the United States (widely seen as a major corporate governance scandal) was made against a backdrop emblazoned with the words 'corporate responsibility'.⁹³

More recently, the collapse of Italian food giant Parmalat led delegates to the International Bar Association's Auckland Conference 2004 in October 2004 to ponder the reputational risks of practising financial law. Bruno Cova, lead counsel to the commissioner of Parmalat Group, commented that '*global law firms are at risk that their reputation will be destroyed or they will – God forbid – disappear because of the actions of some of their partners*'. Parmalat has named two Italian law firms as targets in the legal actions it is now taking against professional advisers.⁹⁴

Supply chain pressures

It is often suggested that a company's commitment to responsible behaviour should also be reflected in its relations with its suppliers. In other words, businesses with a commitment to corporate responsibility should seek to ensure that their concerns are shared – and acted on – by their suppliers. In some parts of the world, and in some sectors, supply chain pressures are a major driver of corporate responsibility. The same appears to be the case in the legal profession. As CMS Cameron McKenna point out '*it is becoming increasingly common for firms to have to demonstrate compliance with corporate responsibility principles in order to win appointment to a panel of legal advisers or to remain on the panel*'.⁹⁵

Campaign pressure

One significant driver of corporate responsibility – campaign and media pressure – has not so far materialized directly in relation to the legal profession, save perhaps for concern about 'fat cat lawyers' charging exorbitant fees. But that may change as the corporate responsibility agenda itself moves into areas where lawyers play a major role in defining business impacts.

In some circumstances, law firms have the potential to be more visible targets for campaign pressure than the clients they advise. Even businesses that are less susceptible to market-based pressure from the corporate responsibility agenda may turn to high profile commercial law firms to provide them with legal advice. The names of well-known law firms may appear as addresses for service of documents, or they may be disclosed in company accounts.

For the future, it is possible that campaign efforts to target law firms will offer an alternative way to reach companies whose branding and reputation do not generate effective incentives for responsible business practices.

The campaign pressure goes further than the basic question ‘when should a lawyer refuse to act for a business with dubious ethics’? For example when a contract reveals a bargain in which one side clearly benefits disproportionately⁹⁶ one might legitimately ask whether adversarial negotiation and the lawyer’s duty to his or her client have gone too far. The legal adviser may be among the next targets of the emerging ‘moral liabilities.’

Regulation

Along with rules of professional ethics, binding on the profession, legal regulation also has the potential to generate incentives for integration of corporate responsibility in the practice of business law.

In the US, the Sarbanes-Oxley Act reflected a formal response to the corporate governance issues associated with the collapse of Enron.⁹⁷ The Act, like the collapse of Enron itself, implicates lawyers in a number of ways, but most directly through section 307, which requires the SEC to adopt rules of professional conduct for lawyers ‘appearing and practicing’ before it on behalf of an issuer of securities.⁹⁸

The SEC’s Part 205’ regulations, effective from August 5, 2003,⁹⁹ now incorporate mandatory ‘up the ladder reporting’ (i.e. reporting on actual or potential transgressions to individuals or functions ‘higher up’ the organisational hierarchy) in circumstances where a lawyer falling within the scope of the provisions ‘becomes aware of evidence of a material violation’ of securities law or breach of fiduciary duty or similar violation by the issuer or any of its representatives or agents. However, they stop short of requiring immediate direct reporting to the board, incorporating a graduated approach.

The SEC postponed providing a rule on ‘noisy withdrawal’ which would have required publicly notified (and hence ‘noisy’) withdrawal of legal representation in certain defined circumstances. Instead, the SEC outlined the circumstances in which a legal adviser not receiving a satisfactory response to a ‘material violation’ should withdraw from acting; notify the SEC of the withdrawal, and disaffirm relevant documents. The rules do however permit an attorney to disclose confidential information relating to the disclosure to the SEC in certain circumstances.¹⁰⁰

Section 307 and the SEC’s rules have generated hot debate within the legal profession – both in the US and abroad. Concerns were raised about potential conflicts of interests inherent in the idea that the SEC might deliver rules to ‘regulate the advocate of one’s adversary’; tensions between the SEC rules and existing rules of professional conduct; the balance to be drawn between the interests of investors and the interests of issuers;¹⁰¹ and the impact of the rules on the relationship between lawyers and their clients more widely. One commentator asked ‘*Why is the legal profession so worried? Because the new law pricks at the heart of a system under which lawyers have always escaped accountability in business cases.*’¹⁰²

Aside from detailed regulation of legal practice within the corporate governance arena, lawyers also play a key role in a variety of anti-money laundering and anti-fraud measures. Legislation around the world governs the circumstances in which lawyers are required to report suspicions of money laundering to regulatory bodies charged with dealing with money laundering or proceeds of crime.¹⁰³

Good employment practices, staff recruitment, job satisfaction and retention

The ability to attract and retain the best staff is sometime cited as a driver of CSR in business more widely. But the relevance of this driver for recruitment of in-house legal teams has not yet been tested.

So far as external legal advice is concerned, lawyers with a commitment to social justice and public service have often sought out work in law firms whose client base and work matches their values. The corporate responsibility agenda provides an opportunity for business law firms too to demonstrate their social and ethical values to prospective employees. Business law firms may be moved to adopt 'corporate responsibility' policies by the possibility of attracting and retaining the best possible professionals.

Development of attractive policies on *pro bono* legal advice is one way to achieve this. For example, according to a recent report of a major *pro bono* conference in Canada, 'a *pro bono* policy improves the quality of life in a law firm and that leads to workplace satisfaction which, in turn, leads to retention of the firm's lawyers'.¹⁰⁴ The conference addressed the 'business case' for *pro bono*, pointing to the highly developed *pro bono* policies of the 100 most profitable law firms in the United States. According to conference speaker Esther Lardent, President and Chief Executive Officer of the Pro Bono Institute at Georgetown University Law Center, '*profitability has not suffered in these firms from the implementation of pro bono policies; in fact, in many cases, profitability has increased.*'

7. Commercial law firms are beginning to take up corporate responsibility in their own practices – but there is more to do

It is clear that a range of drivers exist for business lawyers to engage with CSR. But what might it in practice mean? Adapting a framework developed by Jane Nelson of the International Business Leaders Initiative, there are three main areas where law firms could look to take action: ¹⁰⁵

- The direct impacts of their core business activities.
- Social investment in the wider community.
- Public policy processes of relevance to their core competencies or areas of influence. ¹⁰⁶

Core business impacts

A number of private law firms are beginning visibly to position themselves directly in relation to corporate responsibility. Among the most prominent is US law firm Foley Hoag. The website introduction to the firm's corporate social responsibility practice announces that:

'At Foley Hoag, we help savvy business leaders limit their companies' risk by incorporating internationally recognized standards into their strategic planning, crisis response strategies, and relationships with stakeholders... We help our clients succeed by providing them with the information by which they can adopt risk-controlling, strategic business practices....' ¹⁰⁷

Australian law firm Holding Redlich say they are the first law firm in Australia to launch a comprehensive CSR service. ¹⁰⁸ In Europe, Danish law firm lawhouse.dk describes itself as 'a Danish law firm specializing in corporate social responsibility with a focus on international human rights'. ¹⁰⁹ English law firm Blake Lapthorn Linnell chooses to use the term 'CSR' in describing its environmental services. ¹¹⁰

Developing CSR advisory services is one way for law firms to address their 'core business'. Other include integration of 'best practice' approaches to human resources management, good environmental practice in the workplace, and equal opportunities. For example in March 2003, Finnish law firm Hannes Snellman was included among the final nominees in the 'lifelong learning' category in a competition to find companies which have demonstrated excellence in the fields of lifelong learning, diversity and gender equality. ¹¹¹

There are some major challenges here too. In particular, the core culture of commercial law firms may remain uncondusive to 'best practice' employment. McKennas point to a problem facing many commercial law firms – the long hours involved in work involving commercial transactions. They note that *'Although questions may sometimes reasonably be asked whether there is an absolute need for*

*a transaction timetable to be such as to require repeated all-night working, it is the case that in many situations challenging deadlines must be met with the result that law firm partners and staff work very long hours for protracted periods.'*¹¹²

Sometimes integration of corporate responsibility considerations into core business practices may mean taking a distinctively 'national' approach. For example, in South Africa a major theme in the corporate responsibility agenda is black economic empowerment (BEE). This affects law firms both as advisers (since law firms are involved in advising on financing mechanisms and corporate structurings to facilitate black economic empowerment, e.g. through the establishment of financial instruments to facilitate black ownership) and as subjects of corporate responsibility (since the legal profession itself lies within the ambit of legislation and notions of best practice on black economic empowerment). In the third quarter of 2003, the South African magazine *Black Business Quarterly* carried three articles featuring the work of a number of South African commercial law firms in furthering the black economic empowerment agenda.¹¹³

Social investment

Like other businesses, law firms have begun to develop programmes to contribute to the progressive development of the communities in which they are based. One familiar area that is now being recast as part of is the provision of legal advice or assistance 'pro bono publico' (literally 'for the public good' and shortened to pro bono – but in fact often synonymous with 'on a non-fee charging basis'). There are already examples of rules of professional conduct that exhort lawyers to carry out pro bono work.¹¹⁴ But the potential contributions of law firms to social investment go further too. For example, London based City law firm Linklaters has adopted a global community investment programme covering legal pro bono work, staff volunteering and charitable donations.¹¹⁵ The Swedish commercial law firm Vinge has established a programme to work with five schools with the aim of inspiring young people with 'immigrant backgrounds' to attend law school.¹¹⁶ And in 2003, the then UK Corporate Social Responsibility Minister Stephen Timms MP singled out the pro bono contribution of law firm Lovells advising environmental organization Greenworks on conclusion of a furniture re-use contract with global bank HSBC.¹¹⁷

The public policy role of lawyers

Corporate responsibility could spur business lawyers to play a positive advocacy role in public policy processes that touch on the sphere of influence of the legal profession.

Businesses of all kinds are generally comfortable with the idea that lobbying public policy makers to uphold their commercial interests is an acceptable activity. Law firms are no exception. And the contributions that business lawyers and law firms make to public policy debates – for example consultations on proposals for new

legislation – may on occasion expressly be framed to further the commercial interests of their clients. This can serve the incidental purposes of drawing the attention of potential clients to the suitability of individual law firms as advisers.

Where broad public goods are at stake – such as environmental protection, social justice and poverty reduction, education, and upholding human rights, businesses are often reluctant to play a transparent public advocacy or lobbying role. At the same time, business lobbying can undermine efforts to strengthen social or environmental protection.¹¹⁸ There is now discrete discussion on the boundaries of ‘responsible lobbying’.¹¹⁹ Taken to its logical conclusion, business lawyers might be expected, as responsible business actors, to advocate change to the law in those areas where it fails to ensure that business and sustainable development are mutually supportive. But the ‘business case’, as distinct from the ‘values case’ for this kind of action can be difficult to make.

One area where this ‘public policy’ role of business lawyers may give rise to new initiatives lies with the work of the International Criminal Court. The day-to-day work of business lawyers affords them insights, not only into their clients’ affairs, but also into the practices of non-client businesses. In September 2003, the keynote address at the opening ceremony of the International Bar Association’s annual conference in San Francisco was given by the chief prosecutor of the newly established International Criminal Court. Luis Moreno-Ocampo called on business lawyers to assist in bringing perpetrators of international crimes to account. He highlighted atrocities in the Congo and noted that businesses in 25 countries, including the UK and the US, stood accused of helping to finance activities of the perpetrators of these crimes through the illegal trade of arms and natural resources, as well as money laundering. *‘There is a network of lawyers out there able to give information on these countries and to give information to their clients,’* he was reported as saying. Coverage of the speech in the legal press suggested, rightly or wrongly, that it served the incidental effect of bringing home to his audience that *‘some of the illegal business activities he referred to are likely to have been facilitated by lawyers.’*¹²⁰

Will business lawyers lead the field in corporate responsibility?

Notwithstanding the wide range of law firm initiatives now being promoted under the ‘CSR’ umbrella, there is a real risk that the legal profession’s overall response to the agenda will do little to position it as a leader. A number of law firms have begun to brand their philanthropic and community-based initiatives, and their *pro bono* work, under the banner of ‘corporate social responsibility.’ For example, the recruitment material for trainee solicitors of Scottish law firm Brodies talks of its commitment to *‘its corporate social responsibility programme through its pro bono work with organizations such as the Citizen’s Advice Bureau, Scottish Business in the Community and Young Scot.’*¹²¹ Transnational firm DLA Piper Rudnick Gray Cary announces on its UK website that it takes corporate social responsibility

very seriously, with a strategy concentrated in *'four platforms: education; health and well-being; regeneration and environment; pro bono legal advice.'*¹²² The Panamanian business law firm Pardini & Associates announce on their website that they are a signatory to the UN Global Compact – one of few to sign up to the Compact to date. The law firm announces that *'in fulfilling the principles of the Global Compact, Pardini & Associates decided to focus on children, specifically in a special center for homeless kids called 'The City of Children' and we launched our project 'Building Values in Children.'*¹²³ Unless such statements of commitment to corporate social responsibility demonstrate law firms' commitment to integrating CSR throughout their core business activities, they run the risk of presenting little more than a 'CSR ghetto'¹²⁴ within the firm.

Without greater collective reflection, the legal profession may soon visibly trail other business sectors that are more ready to address some of the underlying challenges of CSR for their overall impacts and contributions to society. A vision of corporate social responsibility that is founded in pro bono advice, community initiatives and the development of new CSR-related practice areas will not necessarily address many of the challenges that have been identified in this paper.

8. Concluding remarks

Lawyers will need increasingly to absorb the relevance of the corporate responsibility agenda – and its underlying principles – for their work. But lawyering with a view only to the individual short-term commercial interests of clients could hamper wider progress in the corporate social responsibility agenda by undermining 'best practice' business approaches that take longer-term perspectives into account. Corporate responsibility means revisiting the existing balance between the role of commercial lawyers in 'value-maximisation' (e.g. through contractual allocation of costs and risks) and 'prevention of value-destruction' (e.g. through litigation). When the balance between these two functions is aligned with corporate social responsibility, the result is an imperative to factor in emerging concepts of 'value' that centre on external stakeholder expectations.

The legal profession has a great deal to offer to the progressive development of responsible business practice. The evidence is that lawyers are already deeply embedded within the agenda, just as law is already a significant part of corporate responsibility. Business lawyers need to become more visible in corporate responsibility, so that real integration between legal and corporate responsibility mindsets is fostered. And they need to address their role with humility, so that the essential vibrancy and innovation inherent in corporate social responsibility can be sustained.

Endnotes

- ¹ Halina Ward, *University of St Thomas Law Journal*, Spring 2004, Volume 1 Number 2, at pp 813-856.
- ² CCBE, *Corporate Social Responsibility and the Role of the Legal Profession: A Guide for European Lawyers Advising on Corporate Social Responsibility Issues*, Update No 1, February 2005.
- ³ CMS Cameron McKenna, *Corporate responsibility: the role of the legal profession*, London, January 2005.
- ⁴ E.g. The World Business Council for Sustainable Development or Business for Social Responsibility, at <http://www.wbcsd.org/DocRoot/I0NYLirijYoHBDflunP5/csr2002.pdf> and <http://www.bsr.org/CSRResources/IssueBriefDetail.cfm?DocumentID=48809> respectively, last visited 25th July 2005.
- ⁵ E.g. the European Commission, at http://europa.eu.int/comm/employment_social/soc-dial/csr/greenpaper_en.pdf, or the International Chamber of Commerce, at http://www.iccwbo.org/home/news_archives/2002/businsocdoc.asp, last visited 25th July 2005.
- ⁶ The classic working definition of sustainable development is found in World Commission on Environment and Development, *Our Common Future*, Oxford University Press, (1987) at page 8, which defines sustainable development as development that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs’.
- ⁷ The CCBE’s CSR Guide casts the net rather more widely, suggesting that ‘there is a common thread and goal applicable throughout all Member States, i.e. that correspondence, documentation and information entrusted by the client to the attorney or otherwise gathered in the course of the client relationship by the attorney shall be treated as confidential and shall in general be protected against [disclosure in court proceedings through the process known as] discovery’, ante, n.2, at page 11.
- ⁸ Extracted from http://www.hcourt.gov.au/speeches/kirbyj/kirby_stjames2.htm, last
- ⁹ ACCA/UNEP, UK, 2002, available online at ACCA, *Industry as a partner for sustainable development: Accounting*, 2002, available online at http://www.emawebsite.org/documents/emaric_250.pdf, last visited 27th July 2005.
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1. requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
2. if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors".

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